Supreme Court, U.S.
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No. 97-1609

In The

Supreme Court of the United States

October Term, 1997

FRANCIS OSEI-AFRIYIE,

Petitioner,

vs.

GRACE AMPOFOH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

RESPONDENT'S BRIEF IN OPPOSITION

GERALD I. STREET
Counsel of Record
TWILLEY & STREET, P.A.
Attorneys for Respondent
426 South State Street
P.O. Box 1366
Dover, Delaware 19901
(302) 735-8400

146129

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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SUMMARY OF ARGUMENT

I. The Trial Court did not exceed its jurisdiction because it did not order the sale of a non-marital asset. Since the Trial Court did not order the sale of nonmarital property, it did not deprive Petitioner of his property interest in the property. Since there was no deprivation of Petitioner's property interest, due process protections did not attach and thus, there could be no violation of Petitioner's due process rights.

II. Even assuming that the Trial Court exceeded its jurisdiction by ordering that money be paid to Petitioner after the sale of an asset outside the Court's jurisdiction, Petitioner's argument is mooted because the nonmarital property was transferred shortly after the Trial Court's Order and Petitioner received the payment ordered by the Trial Court. Consequently, there is no remaining justiciable case or controversy over which this Court can assert jurisdiction. The Petition for Writ of Certiorari effectively asks this Court to render an advisory opinion.

III. Petitioner has failed to clearly articulate at any judicial level what actually is his basis for an equal protection argument. Petitioner's equal protection argument is flawed in that Petitioner relies upon several misstatements of the Trial Court's ruling in his attempt to construct an equal protection argument. Additionally, Petitioner's equal protection argument should be denied because he did not allege said claim in a timely fashion in the State Courts. Petitioner alleged this equal protection claim for the first time in his Motion for Reargument directed to the Delaware Supreme Court after he had the opportunity to fully present his arguments in both his Opening Brief and his Reply Brief in the same court.

IV. The Trial Court sustained Respondent's objection against two witnesses being allowed to testify. One witness

would have testified as to the value of certain property but the parties disagreed about whether the property was marital and, therefore, such testimony was premature. The second witness would have testified as to the ownership but was not competent to testify about the law of Ghana. The Trial Court simply made an evidentiary ruling which was consistent with Delaware rules of procedure and evidence, not a violation of due process.

STATEMENT OF THE CASE

Petitioner's application for a writ of certiorari contains extensive extraneous material and several critical misstatements of fact and law. Respondent offers the following pursuant to United States Supreme Court Rules 15 and 24(g).

The petition involves an appeal from a State Trial Court's findings, conclusions and rulings relative to the division of marital assets between divorcing parties pursuant to a state statute. The Delaware property division[1] statute sets out what factors a trial court may consider in reaching its decision of how to divide the assets and liabilities. While the factors are broad, the trial court may neither ignore those factors, nor consider additional ones. Because it is a statutory court and not a constitutional one, the Delaware Family Court's jurisdiction is limited to what is granted in its enabling legislation.

A. Nature of the Proceedings.

Petitioner (hereinafter "Husband") and Respondent (hereinafter "Wife") were divorced by decree of the Family Court of the State of Delaware. The Family Court conducted a bench trial to hear and decide matters ancillary to the divorce (primarily, the issue of the appropriate division of the marital estate). The Family Court issued is Opinion and Order on the ancillary matters. No post trial motions were filed.

1. 13 Del. C. § 1513(a).

Husband later perfected an appeal to the Delaware Supreme Court.[2] On January 7, 1998, after the parties had completed briefing, the Delaware Supreme Court issued a brief Order affirming the Family Court's judgment and "well-reason[ed] decision." *See* Petitioner's Writ of Certiorari at 16a. Husband then filed a Motion for Reargument, which was denied in an Order by the state Supreme Court on January 26, 1998. *See* Petition at 17a. Husband filed his Petition for a Writ of Certiorari on or about March 30, 1998. This is Wife's Brief in opposition to Husband's Petition.

B. The Parties' Marriage and Divorce.

Husband and Wife were married 15 years before the Family Court entered its decree divorcing them. During their marriage, the parties acquired several valuable properties, both real and personal, including:

(1) their marital home, located in Delaware;

(2) four rental properties, also located in Delaware;

(3) several bank accounts;

(4) pension rights and deferred compensation accounts; and

(5) miscellaneous personal property such as household furnishings and cars.

Also during the marriage, Wife, a native of Ghana, sent several thousand dollars to her family who remained in Ghana. Some of this money was sent at Wife's own initiative, when she became concerned about her parents' and siblings' inadequate housing; some was requested by her father. In both cases, Wife

2. Appeals from the Family Court are to the Delaware Supreme Court without intermediate appellate review. 10 Del. C. § 1051(a).

intended that the money be a gift with no expectation of repayment. Some of the money was used by Wife's family to construct a house on land Wife's father had previously acquired in Ghana (hereinafter "the Ghana property"); one of Wife's brothers also contributed money to the construction costs. The house was intended to be a home for Wife's family still residing in Ghana.

Some months *after* their divorce, the parties purchased a fifth Delaware rental property (hereinafter "the Hancock Street property"), taking title as tenants in common. The parties shared the purchase price of the Hancock Street property evenly, consistent with a practice and an agreement they followed during their marriage. Throughout their long marriage, Husband and Wife essentially contributed equally to the payment of their normal household expenses. This sharing was regularly and precisely tallied and reconciled by the parties, reimbursing each other for any imbalances. Husband and Wife also contributed equally to the acquisition costs of their marital home and their investment properties. Each party maintained their own and joint bank accounts and investment vehicles.

C. The Petition Misrepresents the Trial Court's Factual Findings.

Throughout his Petition, Husband cites portions of the trial record which are favorable to his position and then argues as if there was no dispute about the claimed facts. However, many times his claims and statements of alleged facts were hotly disputed at the trial. For example, Husband states that he "was responsible for all expenses . . ." for a two year period while the couple resided in Canada. *See* Petition at 7. Wife emphatically denied this version of the facts at trial, stating that she paid one–half of all expenses throughout the marriage. The Trial Court found "Husband's contentions to have little to no

merit. As discussed earlier, it was undisputed that the parties both contributed exactly half towards all expenses and acquisitions." *See* Petition at 11a.

Another example of Husband's partial description of facts contained in the record is his claim that "[W]ife also withdrew over $4,800 from a joint account and deposited it into her individual account." *See* Petition at 8. What he failed to tell this Court is that Wife also left $4,800 in the account so that the total distribution of that account was equal, *a fact that Husband appeared to admit at trial under cross-examination*. Presumably, these discrepancies are due to Husband's lack of understanding of his responsibility to fully and fairly portray the record, as he is not a lawyer.

The Trial Court resolved the competing factual contentions between the parties and a detailed refutation of each of Husband's misstatements will not be attempted here. The Trial Court's findings and conclusions were sufficiently supported by the record so as to warrant the Delaware Supreme Court affirming the decision[3].

D. The Petition Misrepresents how the State Trial Court Applied the Delaware Law Relative to the Burden of Proof, Evidentiary Rulings and Consideration of the Statutory Factors Supporting its Decision.

In its written order, the Family Court analyzed each of the factors it is statutorily required to consider by Delaware's domestic relations law. *See* Petition at 1a. After considering these factors, the Court concluded that the marital assets should

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3. Under Delaware law, a trial court's finding of facts will be set aside if they are found to be clearly wrong and justice so requires. *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, Del. Supr., 402 A.2d 1202 (1979). *In Re Estate of Margaret A. West*, Del. Supr., 522 A.2d 1256 (1987).

be evenly divided between Husband and Wife. *Id.* The Trial Court's Order dividing the marital property did *not* include either the Ghana property or the Hancock Street property in the distribution. *Id.*

1. *The Hancock Street Property.*

The parties agreed at the ancillary hearing that the Hancock Street property was purchased after their divorce. Consequently, the Family Court concluded that the property was not a marital asset and was not subject to division by the Family Court. Contrary to Husband's assertions and statements in his Petition for Writ of Certiorari, the Family Court did *not* "issu[e] an order that a non-marital property . . . be sold . . ." *See* Petition at i, Question Presented 1. *See* also Petition at 9 ("[T]he court issued an order on a non-marital property over which it had no jurisdiction . . ."). The Family Court's Order[4] *did* require Wife to pay Husband the cash necessary to equalize the Court's distribution of the actual marital estate within two months of the sale of the Hancock Street property. *See* Petition at 15a.

2. *The Ghana Property.*

Husband testified at the Family Court trial about Wife's contributions to the Ghana property in an effort to show that Wife had "acquired" the property during the marriage as required under Delaware law to qualify an asset as part of the marital estate. The parties' disagreement at trial about the Ghana property was not with what had happened, *i.e.*, the facts, but rather with the legal significance of those facts, *i.e.*, the conclusions to be drawn.

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4. This provision was actually included in a footnote to an Exhibit to the Court's Order, raising questions as to whether it was even an Order of the Court.

Husband asked to present the telephone testimony of witnesses from Ghana purportedly to speak to the property's ownership and value. The Trial Judge sustained Wife's objections to this testimony, noting that neither party had proffered competent evidence of property law in Ghana, that Husband had offered no testimony rebutting that the property had been "acquired" by Wife's father, not Wife, and that the Court already had before it Husband's testimony and documentary evidence suggesting Wife's ownership. The Trial Judge also stressed that telephone testimony "should be discouraged and should only be used in exigent circumstances and only where both parties waive their constitutional rights to confrontation." *See* Petition at 54a.

Husband also argues he was denied equal protection of the law because the Trial Judge did not require Wife to prove that the Ghana property was exempt from the marital estate. Husband again misunderstands the Family Court's ruling. Wife denied any ownership interest in the Ghana property. Consistent with Delaware law, the Trial Judge required Husband, as the proponent of the alleged marital asset, to show that the property was "acquired" during the marriage.

Had Husband met his initial burden of proof, then Husband is correct that the evidentiary burden would then have shifted to Wife to prove why the Ghana property should be excluded from the marital estate. The Court concluded, however, that Husband never met his initial proof of showing that Wife "acquired" the property during the marriage and, hence, the Court never reached the question of whether it should be excluded. Husband has not made a showing that Delaware's laws are disparate in their application or their result.

REASONS FOR DENYING THE WRIT

I.

HUSBAND'S CLAIM THAT THE TRIAL COURT DENIED HIM DUE PROCESS OF LAW WHEN IT DELAYED HIS PAYMENT IS NOW MOOT AS THERE NO LONGER IS ANY CASE OR CONTROVERSY.

Article III of the United States Constitution limits the jurisdiction of the Supreme Court to hearing only a "case or controversy." One of Husband's claims in support of his Petition for Writ of Certiorari is that the Trial Court conditioned payment of an amount due to him on an event outside of its jurisdiction and, therefore, denied him due process of law as guaranteed by the Fourteenth Amendment.

The relevant facts disclose that there no longer is a case or controversy worthy of this Court's attention because Wife has paid Husband the sum determined to be due him by the State Court. *California v. San Pablo & Tulave R. Co.*, 149 U.S. 308, 313-314 (1893). This sum was determined to be due by the Trial Court at the conclusion of a marital property division hearing after the parties had divorced pursuant to the relevant state statutes contained in Title 13 Delaware Code Chapter 15, *et seq.*

The Trial Court determined that an appropriate division of the marital assets and liabilities resulted in Wife owing Husband the sum of $26,024, to be paid two months after the sale of the Hancock Street property, an asset owned by the parties but not part of the marital estate. *See* Petition at 15a. Husband acknowledges that he accepted payment of this sum on March 9, 1998. *See* Petition at 29, n.3. Thus, Wife submits that this issue has ceased being a controversy.

Husband counters the question of mootness by suggesting that the Trial Court might repeat this mistake in the future in the case of other litigants and, therefore, this Court should grant his Writ. Most recently this Court reaffirmed its concern about mootness when it specifically declined to endorse the practice of assuming jurisdiction for the purpose of deciding the merits, a practice known as the doctrine of hypothetical jurisdiction. *Steel Co. v. Citizens For a Better Environment*, 118 S. Ct. 1003, 1012 (1998). Husband's concern about the possibility of future actions is speculative and "conjecture at this point." *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972). This Court has previously ruled such speculation is an inadequate reason to continue jurisdiction. *Id.*

While this Court does have the discretion to look beyond the fact of the payment if it believes a justiciable case or controversy continues to exist, there is nothing about this case that warrants such extraordinary consideration. The mootness question in this case is analogous to the one raised in *DeFunis v. Odegaard, et al.*, 416 U.S. 312, 317 (1974). There, the petitioner had been denied admission into law school. *Id.* at 314. During oral argument before this Court the school confirmed that the petitioner had been recently granted admission and would be allowed to proceed like any other student. *Id.* at 315. The petitioner argued that the school might somehow reverse its position or otherwise impair his chance of graduation in the future. *Id.* The court concluded that petitioner's unsubstantiated fear was not sufficient to treat the matter as a case or controversy and observed that "[a] determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result. . . ." *Id.* at 317.

There are numerous cases which outline the reasons why a matter must be a "case or controversy" to comply with the Court's constitutionally mandated, jurisdictional limits. One of

the reasons is succinctly stated in the case of *Lewis v. Continental Bank Corp.* 494 U.S. 472 (1990). There the petitioner was a bank holding company that had been denied the right to open a branch bank in another state. *Id.* at 473. The statutory reasons relied upon by the Banking Commissioner were amended during the appeal process in such a way that the applicant bank could no longer qualify for other reasons regardless of how the constitutional issue then before the Supreme Court was resolved. *Id.* at 475-76. This Court said ". . . a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. . . ." *Id.* at 477. The Court went on to say that it is not enough that a dispute existed when the suit was filed or review was obtained but rather "The parties must *continue to have a 'personal stake* in the outcome' of the suit." (Emphasis added). *Id.* at 477-78.

What Husband is in reality seeking is an advisory opinion, since he has been paid in full by Wife. Advisory opinions may be what Husband wants to satisfy some personal desire but it is simply and quite clearly beyond this Court's jurisdiction.

Finally, Husband's due process argument with respect to the Hancock Street property misstates the Trial Court's ruling. The Family Court did *not* order the sale of this property; it simply used the parties' voluntary sale of the property as the triggering event for Wife to pay Husband the money due him as part of the marital estate distribution. Since Husband was not deprived of a property interest by the Trial Court's ruling, no due process rights attached and, thus, there could be no due process violation.

II.

CERTIORARI SHOULD BE DENIED BECAUSE HUSBAND MISSTATES THE STATE COURTS' RULINGS AND DID NOT PROPERLY RAISE HIS CONSTITUTIONAL ARGUMENT IN THE STATE COURTS.

Husband also seeks his Writ on the grounds that he was denied equal protection under the Fourteenth Amendment because the Trial Court did not require Wife to show that the Ghana property and the parties' pension and deferred compensation accounts should be excluded from the marital estate as required by state law. First, Husband misstates the Trial Court's ruling. The Family Court concluded that Husband had not shown that the Ghana property was "acquired" during the marriage, and thus, that it was even marital property, a burden placed on Husband by state law. *C.Q. v. Norman J.Q.*, 452 A.2d 951, 954 (Del. Supr. 1982). Because the Ghana property never became part of the marital estate, there was no burden on Wife to show that it should be excluded.

The Trial Court *did* conclude that the parties' pension rights and deferred compensation accounts were marital property and then concluded that the equitable distribution of the assets was to allow each party to retain the accounts titled in their name noting that it would be "inequitable to now attempt to split the accounts and equalize the balance to the detriment of the more frugal party." *See* Petition at 13a. The Trial Court made specific findings of several facts to support its conclusion, including that:

(1) both parties were employed throughout the marriage;

(2) Wife began working within a few days of arriving in Canada from her home in Ghana;

(3) the parties maintained separate bank accounts;

(4) the parties contributed exactly half towards all expenses, including utilities and groceries;

(5) even the phone bill was divided equally and each spouse was expected to pay for their own long distance phone calls;

(6) each of the parties throughout the hearing referred to these accounts and money as "my money" and "my account;"

(7) contributions towards the purchase price and settlement costs of the marital homes and rental properties were essentially split equally between the parties;

(8) some of Husband's requests for credit were "frivolous and unfounded;" and

(9) "for approximately 15 years, Husband and Wife managed their separate earnings and agreed to their specific financial arrangement." *See* Petition at 6a-13a.

Under Delaware law, a trial judge's findings will normally be approved when the factual determination turns on a question of witness credibility and the acceptance or rejection of live testimony by the trial judge. *Barks v. Herzberg*, 206 A.2d 507, 508 (Del. Supr. 1965). This is true so long as there is sufficient evidence to support the findings of the trial judge, especially when based on live testimony. *Brittingham v. American Dredging Co.*, 262 A.2d 255, 257 (Del. Supr. 1970). Husband's arguments to the contrary, this is the effect of Delaware Supreme Court's rulings affirming the Trial Court's Order.

Secondly, Husband did not present his equal protection argument to the Trial Court or to the Delaware Supreme Court in his appellate briefing. Husband did generally allege, for the first time, in his Motion for Reargument to the state Supreme Court, that there had been a "disregard of equal protection of the law by the trial court." *See* Petition at 21a. The Motion for Reargument did not indicate whether the alleged equal protection violation was state or federal, offered no authority supporting the argument, did not explain why the issue was being raised for the first time on a post-decision motion in the State's highest Court and did not comply with Delaware Supreme Court Rule 8 mandating that only issues fairly raised to the trial court be presented for review. *Id.* Husband's failure to properly present his equal protection argument to the Delaware Supreme Court, and that Court's lack of decision on Husband's argument, means that his Petition for Writ of Certiorari should be denied. *Adams v. Robertson*, 117 S. Ct. 1028, 1028-1029 (1997).

III.

HUSBAND'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE DENIED WHEN HE WAS NOT ALLOWED TO HAVE WITNESSES TESTIFY BY TELEPHONE IS IN REALITY A CLAIM THAT THE TRIAL COURT SHOULD HAVE ABANDONED ITS OWN RULES OF PROCEDURE, NOT TO PROTECT HUSBAND BUT RATHER TO ALLOW HIM TO CIRCUMVENT THE RULES' SAFEGUARDS.

Husband claims that he was denied a full and fair hearing because of the Trial Court's refusal to allow two witnesses to testify by telephone from Ghana rather than in person and in open court as required by the Trial Court's rules of civil procedure. Delaware Family Court Rule 43(a) is nearly identical to Federal Rule of Civil Procedure 43(a) and reads in pertinent part:

> In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules, by statute or by order for cause.

Husband claimed that the witnesses would testify about two points: (1) the value of a house in Ghana which Husband claimed to be marital; and (2) who had legal title to the house in Ghana. Wife objected to this method of testimony upon various grounds including: the uncertainty of verifying the witnesses' identity or that their testimony was sworn, inadequate cross examination opportunity and impossibility of the fact finder viewing the witnesses' demeanor which could become crucial in judging their credibility.

Husband further wanted the witnesses to be allowed to testify as to how lawful title to land was established in the countryside of Ghana. One of the witnesses was a tradesman and the other a professor of sociology, neither of whom were licensed in Ghana as a lawyer nor otherwise qualified as a lawyer so far as Husband knew. Wife also objected to either of these witnesses testifying since their competency to testify about a matter requiring expertise had not been established.

The Advisory Committee notes to the 1996 Amendments to Federal Rule of Civil Procedure 43(a) summarizes the concerns generally expressed by both the state and federal trial courts about testimony other than in open court in the following passage:

> Contemporaneous transmission of testimony from a different location is permitted *only on showing good cause in compelling circumstances*. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful

> force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission by telephone cannot be justified merely by showing that it is inconvenient for the witness to attend trial.

(Emphasis added). The Committee went on to note that "good cause in compelling circumstances" usually meant unexpected circumstances, such as accidents or illness, not mere inconvenience. Fed. R. Civil Procedure 43(a) Advisory Committee note. They further noted that other possible justifications "must be approved cautiously." *Id.* Husband offered no explanation of unexpected circumstances, except a claim of surprise, a claim the Trial Court decided against Husband.

The courts have commented that the Federal Rules of Civil Procedure "strongly favor" live testimony in "open court" and that the "[s]tate courts have almost universally condemned testimony by telephone unless both parties have consented." *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 358-59 n.2 (8th Cir. 1992). This is precisely what the Trial Judge told Husband when he first argued to allow the witnesses' testimony by telephone.

The courts have affirmed on numerous occasions that

> [t]he primary purposes of Rule 43(a) are to insure that the accuracy of witnesses' statements may be tested by cross examination to allow the trier of fact to observe the appearance and demeanor of the witnesses.

In Re: Adair, 965 F.2d 777, 780 (9th Cir. 1992). These are some of the very objections raised by Wife to the Trial Judge.

What has Husband shown that would warrant this Court reversing the Trial Court's decision to follow its rules, particularly when its rules mirror the federal rules? Husband was allowed to testify himself about all of the matters for which the other witnesses were proffered, so that their testimony would only have been cumulative at best. The Court ruled during the trial that the financial contributions made by the Wife to her parents' home improvements were not done with the expectation of ownership but rather were motivated simply out of concern and affection for her parents. In other words, Wife's contributions were a gift, not the acquisition of a marital property interest. For those reasons, the Trial Court concluded that the property in Ghana was not marital and, therefore, any testimony about its value was irrelevant.

The Trial Court's ruling presumably included consideration for other rules as well. For example, Delaware has adopted the Uniform Rules of Evidence which:

(1) allow testimony to be excluded if the probative value is outweighed by the "danger of unfair prejudice" D.R.E. 403;

(2) allow the court to control the mode of testimony "so as to make the interrogation and presentation effective for the ascertainment of the truth." D.R.E. 611(a)(1); and

(3) permit testimony requiring specialized knowledge to be given only by witnesses who are competent to do so as shown by their special knowledge, training, education, *etc.* D.R.E. 702.

These rules further support the Trial Court's analysis and decision.

Due Process ". . . is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it is a weighing and balancing of:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

Proof of a denial of due process must show not only prejudice but that the prejudice has been "substantial." Indeed, it has been said that a petitioner ". . . will need a strong case . . ." before a denial of due process can be shown when the process under attack has been practiced for a long time. *Jackman v. Rosenbaum, Co.*, 260 U.S. 22, 31 (1922).

What the Trial Court did to Husband was require him to follow the same rules of procedure and of evidence that are applicable to everyone in Delaware and that have been applied for decades. These are the same rules of procedure and evidence that have been adopted by most, if not all, states and by the federal courts. Husband has offered *no* authority for the proposition that a trial judge's evidentiary ruling excluding duplicative telephone testimony without a showing of exigent circumstances violates the Fourteenth Amendment's guarantee of due process. Husband's complaint in reality is that he was required to follow the rules just like everyone else — an application of due process, not a denial of it! If Husband had been allowed to proceed as he had wanted then it is Wife who would have had the claim of a denial of due process.

CONCLUSION

Husband has failed to show that any of his claims violate any portion of the United States Constitution or otherwise present any important federal question. As a consequence, his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GERALD I. STREET
Counsel of Record
TWILLEY & STREET, P.A.
Attorneys for Respondent
426 South State Street
P.O. Box 1366
Dover, Delaware 19901
(302) 735-8400